



**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

DEC 20 1947

CHARLES CLAUDE CRUTLEY  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1947  
No. 451

ANDREW W. COMSTOCK, a holder of Missouri Pacific Railroad Company 5 $\frac{1}{4}$ % Secured Serial Gold Bonds, on behalf of himself and others holding upward of \$900,000 principal amount of said bonds,

*Petitioner,*

VS.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refunding Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company, et al.,

*Respondents.*

**REPLY BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT**

WILLIAM H. BIGGS,  
Attorney for Petitioner,  
Security Building,  
St. Louis 2, Missouri.

PHILLIP I. BLUMBERG,  
of Counsel.



## INDEX

	PAGE
Point I—The petition presents no factual contro- versy _____	1
Point II—An adjudication on the merits of the MOP Claim is necessary _____	3
(a) Laches _____	3
(b) MOP's Pledge of the NOTM Notes _____	4
Conclusion _____	5

## TABLE OF CASES

Commonwealth Light & Power Co., In re, 141 F. (2d) 734 (C. C. A. 7th, 1944) _____	2
Taylor v. Standard Gas & Electric Co., 306 U. S. 307 (1939) _____	2

# INDEX

Page	Chapter I - The position of the ...
1	Chapter II - The position of the ...
2	Chapter III - The position of the ...
3	Chapter IV - The position of the ...
4	Chapter V - The position of the ...
5	Chapter VI - The position of the ...

## TABLE OF CASES

Page	Chapter I - The position of the ...
1	Chapter II - The position of the ...
2	Chapter III - The position of the ...
3	Chapter IV - The position of the ...
4	Chapter V - The position of the ...
5	Chapter VI - The position of the ...

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**No. 451**

---

**ANDREW W. COMSTOCK**, a holder of Missouri Pacific Railroad Company 5 $\frac{1}{4}$ % Secured Serial Gold Bonds, on behalf of himself and others holding upward of \$900,000 principal amount of said bonds,

*Petitioner,*

VS.

**GROUP OF INSTITUTIONAL INVESTORS**, holding First and Refunding Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company, et al.,

*Respondents.*

---

**REPLY BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT**

Petitioner files this Brief in reply to the Brief dated December 12, 1947, submitted by a group of respondents.

**POINT I**

**The Petition Presents No Factual Controversy.**

There is no factual controversy before this Court. The challenge of petitioner is directed solely to questions of law. We asserted this on pages 33 and 34 of our main brief; we assert it again.

Thus, a substantial portion of the claim of the Missouri Pacific R. R. Co. (hereinafter called MOP) against its



dominated subsidiary, the New Orleans, Texas & Mexico Ry. Co. (hereinafter called NOTM), is based on repeated MOP advances to NOTM which were consistently matched within one to five days by NOTM dividends to MOP in substantially equivalent amounts. These are the facts as found by the District Court (R. 19).<sup>\*</sup> Finding of Fact No. 19 contains a chart of such matching loans and dividends which is in full accord with the chart presented on page 7 of our main brief. Such facts arise from extracts from the corporate accounts introduced by respondents as well as by petitioner (Ex. 75-79, 281).

Similarly, another substantial portion of the MOP Inter-Company Claim involves the bookkeeping transaction, six months before bankruptcy, by which MOP wrote up the indebtedness of NOTM to MOP by \$1,261,000. These are the facts as the District Court found in Finding No. 29 (R. 22). These facts also arise from the corporate records, introduced both by respondents and petitioner (Ex. 221-5, 231-2, 240-1), and from the testimony of witnesses for respondents (R. 797, 1043).

These are but two examples of the undisputed facts presented by the case at bar. They suffice to indicate the lack of merit in respondents' contention that we present a factual controversy.

We assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts.

Our position is that the courts below have decided the questions of law presented by the findings of fact in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *In re Commonwealth Light & Power Co.*, 141 F. (2d) 734 (C. C. A. 7th, 1944), and of this Court in *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307 (1939).

---

<sup>\*</sup> References to the transcript of the record are indicated by the letter "R.", except for Volume IV thereof, which is indicated by "R. IV". References to the volumes of exhibits are indicated by the letters "Ex." Arabic numerals in all instances indicate pages.

## POINT II

### **An Adjudication on the Merits of the MOP Claim Is Necessary.**

Respondents further maintain that this case may be disposed of on either of two separate grounds without an adjudication on the merits of the MOP Inter-Company Claim. These alleged grounds are:

(a) laches; and

(b) the pledge by MOP to the Reconstruction Finance Corporation and Railroad Credit Corporation (hereinafter called RFC and RCC) of two NOTM notes representing a portion, but not the entire MOP Claim.

#### **(a) Laches**

The Circuit Court opinion demonstrates that laches does not dispose of this case.

The Circuit Court pointed out that although the District Court had expressed an opinion as to laches, the District Court

"concluded that judicial adjudication should be made as to the debt and that the court should, and therefore it did, hear the evidence covering the whole period of management of the New Orleans by the Missouri Pacific, and it tried out the whole case and all the charges presented by Comstock on the merits." (R. IV, 21)

Similarly, the Circuit Court of Appeals gave no weight to the contention of laches and adjudicated the MOP Claim on the merits.



**(b) MOP's Pledge of the NOTM Notes**

Respondents also seek wholly to avoid an adjudication on the merits by reliance on the legal consequences which they would draw from the one-time MOP pledge, since redeemed, of two NOTM notes representing a portion, but not the entire MOP Claim.

The District Court expressly found that only a portion of the \$10,565,227 Claim was pledged to the RFC and RCC (R. 19-21). Thus, whatever the legal consequences attributed to the pledge, an adjudication on the merits of the validity and priority of the sizable portion of the MOP Claim which was never pledged cannot be avoided. This, of itself, is a complete answer to respondents' contention.

The former pledge to the RFC and RCC does not even dispose of that portion of the Claim represented by the heretofore pledged NOTM notes. This is elementary Bills and Notes law.

(1) As between the maker (NOTM) and the payee (MOP) of these notes, it is clear that all questions with regard to the transactions surrounding their issuance remain open for determination, irrespective of transfer to a holder in due course or otherwise.

(2) Subsequent to the decision of the District Court in this case, the notes were reacquired by the payee, MOP, through its trustee, which is again the holder (R. 1155). It is settled that a payee reacquiring an instrument—even from a holder in due course—is subject to all the equities and defenses of the maker.

(3) The RFC and RCC are no longer in the case. At present no MOP creditor has succeeded to any of their rights. The District Court order authorizing payment of the RFC and RCC was incompletely stated by respondents. Such order only subrogated MOP creditors to the rights of the RFC and RCC “to the extent of their respec-

tive interests, if any, in the cash used in the purchase of" the RFC and RCC claims (R. 1157, 1165). The District Court to this date has not determined whether respondents or any other MOP creditors had an interest in such cash. Until such determination is made no creditor can be said to have any interest in the NOTM notes.

Accordingly, it is understandable why the Circuit Court did not regard the legal consequences of the MOP pledge of sufficient importance to merit discussion.

### CONCLUSION

It is respectfully submitted that a writ of certiorari be granted.

WILLIAM H. BIGGS,  
Attorney for Petitioner,  
Security Building,  
St. Louis 2, Missouri.

PHILLIP I. BLUMBERG,  
of Counsel.